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No. 00-844

IN THE

Supreme Court of the United States

CHARLES GILBERT GIBBS, ET AL.,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Petitioners have asked the Court to decide whether 50 C.F.R. § 17.84(c)—a Fish and Wildlife Service regulation prohibiting the "taking" of red wolves the government has released in North Carolina—is a valid exercise of the federal government's commerce power. In a rushed "midnight brief" filed on January 19, the federal respondents urge the Court to allow the decision below to stand. Respondent Defenders of Wildlife ("DoW") also asks the Court to deny review. Petitioners rebut below respondents' principal contentions.

ARGUMENT

1. Respondents all but ignore this Court's recent decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 (Jan. 9, 2001) ("*SWANCC*"), in which the Court held that the so-called "migratory bird rule" was not a permissible administrative interpretation of the Clean Water Act. As four Justices have already recognized, the migratory bird rule is directly analogous, in its constitutional dimension, to the red wolf regulation. Slip op. 23 (Stevens, J., dissenting); *see* Pet. 9-15. Thus, contrary to respondents' assertion, the *SWANCC* ruling casts substantial doubt on the lower court's ruling in this case.

The government states that, in *SWANCC*, "[t]he Court ultimately issued no constitutional holding." U.S. Br. 17; *see also* DoW Br. 14 ("The Court . . . decided *SWANCC* without reaching any constitutional issue"). That is incorrect. The Court expressly rejected the government's argument that the Court should defer to the interpretation of the statute given it by the agency, be-

cause the Court determined that "significant constitutional questions [are] raised by respondents' application of their regulations." *SWANCC*, slip op. 13. In the absence of such constitutional questions—the same constitutional questions presented in this case—the Court would have been bound to defer to the administrative interpretation. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the "constitutional holding" of *SWANCC* is that the migratory bird rule raised sufficiently serious questions regarding the federal government's authority, under the Commerce Clause, to regulate wild animals that the traditional rule of deference would not be applied.

The government asserts in the alternative that "the constitutional concerns identified by the Court in [*SWANCC*] are inapplicable here." U.S. Br. 18. That is because, according to the government, the red wolf regulation (unlike the migratory bird rule) neither alters the federal-state balance nor intrudes on state power over land use. *Id.* That also is incorrect. The States, not the federal government, have traditionally regulated the wild animals within their borders (*see* Pet. 26-27), and the red wolf regulation infringes that authority as surely as the migratory bird rule. The States also have traditionally exercised authority over agriculture, animal husbandry, and the like. *See, e.g.*, *The Federalist* No. 17, at 118 (Hamilton) (Clinton Rossiter ed., 1961) ("the supervision of agriculture and of other concerns of a similar nature . . . which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction"); *see also* Ala. Amicus Br. 9-13. The red wolf rule, which purports to override a North Carolina statute specifically authorizing the killing of red

wolves in certain circumstances, intrudes on this area of state concern. Pet. 5, 26.

Indeed, any doubt regarding the implications of *SWANCC* for this case is laid to rest by the dissenting opinion. Four Justices were of the view that the migratory bird rule "falls well within the boundaries set by this Court's Commerce Clause jurisprudence." Slip op. 20 (Stevens, J., dissenting). What's more, *they specifically cited the decision below* to support their reasoning. *Id.* at 23. The dissent thus recognized that precisely the same "significant constitutional questions" that troubled the majority in *SWANCC* are squarely raised by this petition. Respondents may wish to pretend that *SWANCC* has nothing to do with this case, but the decision speaks for itself. *See also* "The Glancing Geese Test," Wall St. J., Jan. 16, 2001, at A26.

2. Respondents note that other courts have sustained the constitutionality of regulations promulgated under the Endangered Species Act. U.S. Br. 10-11; DoW Br. 9-10. They do not even address, however, the fact that every appellate decision on this subject has drawn a dissent, nor do they discuss the extensive scholarly debate regarding the constitutionality of such regulations. *See* Pet. 20-24; *see also Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari). The fact is (as *amici* NAHB and PLF have demonstrated) that significant confusion exists regarding the constitutionality of certain environmental regulations in the wake of *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), and that confusion will only be exacerbated by the Court's holding in *SWANCC* that the migratory bird rule raises serious constitutional questions. The confu-

sion can be promptly and directly alleviated by granting review in this case.

3. Respondents contend, incorrectly, that petitioners' challenge is really to Section 9 of the ESA, 16 U.S.C. § 1538, rather than to the red wolf regulation. U.S. Br. 11-12; DoW Br. 21-22. On the contrary, petitioners challenge the administrative decisions to release red wolves in proximity to private lands and simultaneously to generally prohibit landowners from "taking" those wolves even where they pose a threat to people or property. DoW's effort (Br. 6) to portray red wolves as harmless is belied by the fact that FWS, the federal agency responsible for the reintroduction program, has recognized that red wolves are "behaviorally unsuitable animal[s]" that present "a demonstrable . . . threat to human safety." *See* Pet. 17. While petitioners contend that the regulatory prohibition on taking these predators on private land is unconstitutional, they do not challenge, as respondents misleadingly assert, the anti-"take" provision of the ESA in regard to any other species. As Judge Luttig recognized, "the simple (and frankly, considerably less incitant) question of law for [the Court] to decide is whether, assuming its validity under [the ESA], this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause." Pet. App. 47a-48a (dissenting opinion).

As the government acknowledges, the red wolf is an "experimental population" under the ESA, "which grants the Secretary broad flexibility in promulgating regulations to protect such species. *These regulations can even allow the taking of threatened animals.*" U.S. Br. 4 (quoting H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1, at 34 (1982)) (emphasis added). In the absence of

the administrative determination to release red wolves in North Carolina, red wolves would not be threatening petitioners' families and property. And, if FWS had exercised its discretion to allow the "taking" of red wolves, petitioners would not have had cause to challenge the reintroduction program. Thus, it is only the constitutionality of the red wolf regulation, and *not* the ESA as a whole, that is at issue here.

4. Respondents assert that red wolves have a substantial effect on interstate commerce. U.S. Br. 12-15; DoW Br. 17-19. For the most part, respondents simply parrot the reasoning of the court of appeals, which has already been addressed. *See* Pet. 11-13; Pet. App. 48a-50a (Luttig, J., dissenting). The government directs the Court's attention to the commercial motivations of particular individuals (U.S. Br. 12), even though this Court has always focused upon the class of regulated activities as a whole. *See SWANCC*, slip op. at 13 ("although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature'"); *see also* NAHB Amicus Br. 7-8; PLF Amicus Br. 9-10. And respondents endorse the majority's wild speculation regarding a future trade in wolf pelts (U.S. Br. 13-14; DoW Br. 19), without even addressing petitioners' observation that such reliance on remote possibilities is foreclosed by this Court's decision in *Jones* v. *United States*, 120 S. Ct. 1904 (2000). *See* Pet. 24-26. Moreover, while the government criticizes "petitioners' demand for specific proof of the red wolf's near-term commercial importance" (U.S. Br. 14), the government

ignores the fact that it is not petitioners but the Commerce Clause, as interpreted in *Lopez* and *Morrison*, that imposes such a requirement—which the government manifestly has failed to satisfy.

The dissenting Justices in *SWANCC* recited precisely the same considerations on which the court of appeals' decision rested and respondents now rely. *See* slip op. 20-24 (Stevens, J., dissenting). The dissent even cited the decision below in support of its reasoning, as already noted. *Id.* at 23. By not addressing the dissent's arguments in the opinion, the *SWANCC* majority implicitly rejected them. *See, e.g., Clemons* v. *Mississippi*, 494 U.S. 738, 747-48 n.3 (1990). Indeed, had the Court accepted the dissent's rationale (or that of the court below in this case), it would not have found serious constitutional questions with respect to the migratory bird rule—questions equally inherent in the red wolf regulation.

Perhaps recognizing that the handful of red wolves in North Carolina has no impact on interstate commerce, the government urges the Court to "focus on the aggregate commercial significance of all listed species" (U.S. Br. 14)—that is, every animal considered threatened or endangered under the ESA. It contends that "individual species are part of an interdependent web," while explaining unapologetically that "the significance of a particular species cannot always be easily determined at a given point in time." *Ibid.* DoW similarly argues that "[d]estroying natural resources" necessarily affects commerce, and conflates unequivocally commercial *activities* like surface coal mining with patently noncommercial matters like wildlife management. DoW Br. 17-18. These arguments prove too much: With sufficient aggregation, *everything* could be said to affect com-

merce. The government's "global Gaia" approach is thus as constitutionally infirm as the "glancing geese" test invalidated in *SWANCC*. *See Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity . . . that Congress is without power to regulate"); *id.* at 565 ("depending on the level of generality, any activity can be looked upon as commercial"). In any event, petitioners have challenged only the red wolf regulation, and that regulation must be sustained, if at all, on the basis of *red wolves*' connection, if any, to interstate commerce. As the Court explained in *SWANCC*, to sustain the migratory bird rule, it "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." Slip op. 13. Here, the object of the regulation is red wolves, which, even in the aggregate, simply do not affect commerce.

Relying on *TVA* v. *Hill*, 437 U.S. 153 (1978) (which involved the environmental impact of *federal*, not private, action), respondents nevertheless insist that the value of a species is "incalculable" and that "extirpation of a species eliminates for all time the possibility of future commercial uses." U.S. Br. 15; *see also* DoW Br. 18. But this observation, even if constitutionally meaningful, is irrelevant: Before releasing any red wolves in North Carolina, FWS made a determination that those wolves were "nonessential" to the survival of the species. Pet. 19. Even if the "extirpation" of the red wolf species would affect commerce, therefore, the elimination of the wolves in North Carolina would not. *See* Pet. App. 50a (Luttig, J., dissenting).

5. Respondents assert that federal involvement in protecting wildlife is of long standing. U.S. Br. 15-16,

18; DoW Br. 20-21. The cases cited for this proposition, however, demonstrate the futility of their Commerce Clause defense of the red wolf regulation. As the Court explained in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (cited in U.S. Br. 15-16), "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government *when the Federal Government exercises one of its enumerated constitutional powers*." 526 U.S. at 204 (emphasis added). As the cases cited by the *Mille Lacs* Court illustrate, this Court has previously approved federal environmental regulations based on the property power and the spending power. *See* Pet. 27. But, in the absence of such an enumerated federal power (as is the case here, contrary to DoW's unsupported assertion (Br. 12)), the regulation of wildlife is a matter solely of state concern.

As petitioners have pointed out (Pet. 27), and respondents have made no effort to refute, the Court has *never* approved federal regulation of wildlife, *qua* wildlife, under the Commerce Clause. The sole Commerce Clause case cited by the government, *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977) (*see* U.S. Br. 16), held that Congress's power to regulate navigable waters (*i.e.*, the channels of commerce) included the power to regulate commercial extraction of fish from those waters. But the red wolves at issue here bear no such relation to commerce. Similarly, *Andrus* v. *Allard*, 444 U.S. 51 (1979) (misdescribed in DoW Br. 20), stands for the rather unexceptional proposition that Congress can regulate interstate *commercial transactions* involving captured animals. 444 U.S. at 63 n.19. The only other case cited by the government on this point,

Missouri v. *Holland*, 252 U.S. 416 (1920) (*see* U.S. Br. 16), sustained, as the government says, the Migratory Bird Treaty Act as a valid exercise of the treaty power; what the government neglects to mention, however, is that the Court *rejected* the government's argument that the statute was also sustainable under the Commerce Clause. *See* Pet. 27.*

6. The government contends that "protection of endangered species from takings on private lands is essential to the achievement of the ESA's objectives." U.S. Br. 16. But that contention begs the Commerce Clause question in this case. The Court may accept, *arguendo*, the notion that prohibiting citizens from "taking" red

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* DoW suggests that Commerce Clause analysis is unnecessary in this case because the red wolf regulation can be upheld under the treaty power. DoW Br. 23-24. Tellingly, this argument is not made by the government, nor was it relied upon by the courts below (or indeed by any post-*Lopez* court). After all, as this Court has explained, "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957) (plurality opinion). The sweeping approach to the treaty power proposed by DoW would completely eviscerate this Court's Commerce Clause jurisprudence (and the doctrine of enumerated powers generally), as was undoubtedly understood when the Court ignored similar arguments raised by *amici* in *Morrison*. Moreover, this case presents none of the uniquely international concerns animating the treaty upheld in *Missouri* v. *Holland*. *See* 252 U.S. at 431 (noting that "many species of birds in their annual migrations traversed certain parts of the United States and of Canada"). The historical range of the red wolf is "the southeastern United States" (DoW Br. 5), and there is no evidence that any of the wolves at issue crossed a state line, much less an international border.

wolves on their own property is "essential" to some objective of the ESA. The question remains whether such a prohibition is *authorized* by our Constitution. Simply because the ends of a statute may be laudable does not mean that the federal government has the constitutional means to accomplish them by regulation.

Finally, respondents note that in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), "[n]o member of the Court suggested that the ESA . . . might exceed Congress's power under the Commerce Clause." U.S. Br. 11 n.4; *see also* DoW Br. 16. Of course, in *Sweet Home*, no party *raised* a constitutional issue, and the Court had no occasion to consider one. The decision thus has no weight on any constitutional issue, much less the constitutionality of the specific regulation challenged by petitioners. *See, e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989). Indeed, the Court has *never* considered the constitutionality of a regulation promulgated under the ESA, and in the only case involving a federal attempt to regulate on the basis of the presence of wild animals, the Court concluded that the exertion of such authority "raise[s] serious constitutional questions." *SWANCC*, slip op. 13. Those questions can be resolved by granting certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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